

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EDWARD J. DEVINS	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 814930
Refund of Personal Income Tax under	:	
Article 22 of the Tax Law and the	:	
Administrative Code of The City of New	:	
York for the Years 1980 through 1984.	:	

Petitioner, Edward J. Devins, 126 84th Street, Brooklyn, New York 11209, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1980 through 1984.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated August 1, 1996 seeking summary determination in the above-referenced matter. Petitioner filed a response on August 12, 1996.

Upon review of all of the papers filed in connection with this motion, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's refund claim for taxes paid on Federal pension income is barred by the three-year limitations period of Tax Law § 687(a).

FINDINGS OF FACT

1. Petitioner, Edward J. Devins, filed a 1980 New York State personal income tax return on or before April 15, 1981, a 1981 return on or before April 15, 1982, a 1982 return on or before 1983, a 1983 return on or beforebefore April 15, 1984, and a 1984 return on or before April 15, 1985. On each return, petitioner reported and paid tax on Federal pension income.

2. Petitioner filed claims for refund of personal income tax for the years 1980 through 1984 based upon the income tax paid on his Federal pension income. Petitioner did not file refund claims or amended returns before February 22, 1990.

3. On or about October 27, 1994, the Division of Taxation ("Division") issued a Notice of Disallowance for the year 1980 through 1984. The basis of the disallowance was that petitioner did not file refund claims or amended returns within three years of the filing of his original returns.

4. Petitioner filed a petition, dated April 19, 1996, stating that he was seeking a refund for the years 1980 through 1984 in the amount of \$19,877.00 plus interest. In his petition, petitioner argued that the section of the Tax Law which exempted the pensions of officers and employees of the State from income tax was illegal from its inception and therefore the statute of limitations did not apply. Petitioner also maintained that there were cases in other states involving a similar exemption and the statute of limitations and that these cases were in the process of proceeding through the Federal courts. According to petitioner, the claims for refunds for recipients of Federal pensions would eventually be resolved in the Federal courts. Therefore, petitioner requested that proceedings be stayed until a final resolution was reached in the cases proceeding through the Federal court system.

5. The Division filed an answer, dated June 19, 1996, which asserted that petitioner failed to file a claim for refund within three years of the filing of the return for each year in issue and that, therefore, the claims for refund were denied as untimely. The Division further alleged that the "1994 decision to approve refund claims for those who paid New York State income tax on federal pension income was solely limited to those who had filed timely refund claims under the Tax Law."

6. The Division filed a motion for summary determination, dated August 1, 1996, pursuant to 20 NYCRR 3000.9(b)(1). In its motion papers, the Division argued that petitioner failed to file a refund claim for the years in issue within the three-year period of section 687 of the Tax Law.

7. Petitioner filed a letter dated August 9, 1996 which argued that the practice of taxing Federal annuities while exempting the pensions of State retirees was unconstitutional from its inception. Further, this practice was not ruled unconstitutional by the Supreme Court until 1989. It is submitted that, as a result of the foregoing, the statute of limitations is inapplicable.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9[b][1]). From the motion papers, it is apparent that there are no material or triable issues of fact. Therefore, the legal issues may be decided on this motion.

B. In Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 891), the United States Supreme Court held that a tax scheme that exempts from tax retirement benefits paid by the State but not retirement benefits paid by the Federal government is unconstitutionally discriminatory. In Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74), the U.S. Supreme Court further held that the ruling in Davis applies retroactively and that States which violated the tax immunity doctrine must provide a "meaningful backward-looking relief to rectify any unconstitutional deprivation" (id., 125 L Ed 2d at 89, quoting, McKesson Corp. v. Division of Alcohol Beverages & Tobacco, 496 US 18, 31, 110 L Ed 2d 17). A State may provide such relief by awarding refunds to those illegally taxed or provide some other relief that "create[s] in hindsight a nondiscriminatory scheme" (McKesson Corp. v. Division of Alcohol Beverages & Tobacco, supra, 110 L Ed 2d 38). Applying this principle, the U.S Supreme Court found that the State of Georgia had not provided a taxpayer "meaningful backward-looking relief" when it construed a refund statute not to apply to the taxpayer on the ground that the law under which taxes were assessed and collected was subsequently declared unconstitutional (Reich v. Collins, 513 US __, 130 L Ed 2d 454). In reaching this conclusion, the Court noted

that a State may have an exclusively predeprivation or postdeprivation remedial scheme (id. at 459). However, a State may not, as Georgia had done, present a postdeprivation remedy in the form of a tax refund statute, and then declare, after the taxes had been paid, that the remedy did not exist (id.).

Soon after the Davis decision, on July 21, 1989, the Legislature amended Tax Law § 612(c)(3) and the Administrative Code of the City of New York § 11-1712 to place pensions paid to Federal retirees in the same position as pensions paid to State and local retirees. The Legislature declared that the amendment was to take effect "immediately and shall apply to federal pension benefits received in taxable years beginning on or after January 1, 1989" (L 1989, ch 664, §§ 1-3). Thus, in response to the Davis and Harper decisions, the State amended the statute to conform to the rulings.

C. Tax Law § 687 provides, in pertinent part, that:

"(a) General. -- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later

* * *

"(e) Failure to file claim within prescribed period. -- No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article."

D. The scheme presented by the State satisfies the Due Process Clause of the 14th Amendment by providing "meaningful backward-looking relief to rectify the unconstitutional deprivation" (McKesson Corp. v. Division of Alcoholic Beverage and Tobacco, supra). Tax Law § 687(a) adequately meets the requirements set out in McKesson which provides that a state "might provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint. . . ." (id., 110 L Ed 2d at 41). These procedural requirements address both the State's obligation to refund the

unconstitutionally collected funds while at the same time satisfying the State's need for sound fiscal planning.

E. There can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (Mercury Mach. Importing Corp. v. City of New York, 3 NY2d 418, 165 NYS2d 517). In the present matter, there was a question of the constitutionality of taxing the pensions of Federal retirees while exempting the pensions of State and local retirees. This issue was settled by the United States Supreme Court in 1989 in Davis v. Michigan Dept. of Treasury (*supra*). However, petitioner waited more than three years until after the last return was filed and the taxes were paid and after the Davis decision was rendered before he sought tax refunds. Thus, petitioner chose not to file any claims for refunds during the time when a valid claim for a refund could have been filed under Tax Law § 687(a) (Fiduciary Trust Company of New York v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119). Therefore, summary determination in favor of the Division of Taxation is granted on this issue. It is noted that, on the basis of the foregoing, there is no basis to stay proceedings before the Division of Tax Appeals.

F. The Division's of Taxation's motion for summary determination is granted and the petition of Edward J. Devins is denied.

DATED: Troy, New York
October 31, 1996

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE